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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANTONIO CALOCA SOTO,<br><br>Defendant and Appellant. | B231629<br><br>(Los Angeles County<br>Super. Ct. No. TA093544) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as modified.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Antonio Caloca Soto of first degree murder and found true the special allegation he had used a dangerous weapon in committing the offense. On appeal Soto contends the trial court erred in failing to instruct the jury sua sponte with CALCRIM No. 302, which provides guidance on evaluating conflicting evidence. He also challenges the victim restitution order, the attorney fee reimbursement order and other fines and penalties imposed in connection with his 26-year-to-life sentence. We modify the judgment to strike the $20 penalty imposed under Government Code section 76104.7 as unauthorized and affirm the judgment as modified.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Soto was charged in an information with murder. It was specially alleged he had used a dangerous weapon, a knife (Pen. Code, § 12022, subd. (b)(1)),[1] and intentionally killed Elsie Molina by means of lying in wait (§ 190.2, subd. (a)(15)). Soto pleaded not guilty and denied the special allegations.

2. *The Trial*

According to the evidence at trial, in 2002 Molina became romantically involved with Soto, a married man with children. Molina and Soto had two daughters together. In 2006 Soto moved to Texas with his wife and children but continued his relationship with Molina. In April 2007 Soto asked Molina to move to Texas to be near him. She ultimately declined and terminated the relationship. Soto told Molina during a telephone call following their break-up, "If you're not mine, nobody will have you." On a different occasion he threatened Molina, "The day I find you with someone, I'll cut your head off."

On the morning of October 12, 2007 Molina's dead body was found in the cab portion of the truck she drove for her work. A deputy medical examiner with the Los Angeles County Coroner's Office testified Molina's neck had been slashed through the right carotid artery and right jugular vein. She had also suffered blunt force trauma to the

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[1] Statutory references are to the Penal Code unless otherwise indicated.

head and right eye. Police officers found a knife in a storm drain near the scene. Forensic testing confirmed Molina's blood and DNA were on the knife.

Soto initially told law enforcement investigators he had been in Texas on October 11, 2007 and had not travelled to Los Angeles. However, his travel agent testified Soto had purchased a roundtrip ticket from San Antonio to Los Angeles on October 10, 2007, insisting on paying cash. Records established Soto's cell phone was used on October 11, 2007 in Los Angeles near the murder scene to call Molina several times. Video surveillance recordings at Los Angeles International Airport showed a man identified as Soto arriving in Los Angeles on his scheduled flight from San Antonio. Video surveillance from a sporting goods store in Carson showed the same man purchasing a knife identical to that identified as the murder weapon, along with a rope, a five-pound dumbbell and a day pack.

Soto testified in his own defense, explaining he had come to Los Angeles on October 11, 2007 for his daughter's birthday. He had called Molina several times to arrange to see his daughters, but Molina refused to talk to him that evening, telling him to call her back the following day. Rather than wait another day, Soto decided to return to Texas the next morning. Soto acknowledged he had initially told detectives he had been in Texas on October 11, 2007. He had lied because he feared he would be wrongfully accused of being involved in Molina's murder. Soto denied he was the person in either of the surveillance video recordings. He also denied having threatened Molina or killed her.

3. *The Verdict and Sentence*

The jury found Soto guilty of murder and found true the special allegations he had committed the murder by means of lying in wait and had used a dangerous weapon. Molina was sentenced to an aggregate state prison term of 26 years to life, 25 years to life for the first degree murder plus a one-year consecutive term for the dangerous weapon enhancement. In addition, the court ordered Soto to pay a $10,000 restitution fine (§ 1202.4, subd. (b)); $7,473.63 (plus interest) in victim restitution (§ 1202.4, subd. (f)); a $40 court security assessment (§ 1455.8, subd. (a)(1)); a $30 criminal conviction

assessment (Gov. Code, § 70373); and a $20 DNA fee (Gov. Code, § 76104.7). Based on Soto's trial testimony that he had had more than sufficient funds from the sale of his home in California and did not need Molina to pay him back the thousands of dollars he had given to her to help her, the court also ordered Soto to pay $8,719 in attorney fees in connection with his court-appointed counsel's services (§ 987.8).

## DISCUSSION

1. *The Failure To Instruct the Jury with CALCRIM No. 302 Did Not Constitute Prejudicial Error*

Soto contends his trial testimony created a conflict in the evidence as to whether he was the person in the video surveillance recordings and, as a result, the court erred in failing to instruct the jury with CALCRIM No. 302. That instruction provides, "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

The Supreme Court has held the trial court has a sua sponte duty to give such an instruction when conflicting evidence has been presented at trial. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1261-1262 (*Virgil*) [trial court's failure to instruct jury with CALJIC No. 2.22, the predecessor to CALCRIM No. 302, was error in light of conflicting evidence presented at trial]; accord, *People v. Cleveland* (2004) 32 Cal.4th 704, 751; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.) However, the failure to give the instruction can be harmless error. (*Virgil*, at p. 1262.)

In *Virgil, supra,* 51 Cal.4th 1210, the jury was presented with conflicting testimony from witnesses about the appearance and identity of the victim's murderer. Although the defendant did not request CALJIC No. 2.22 (or an equivalent instruction) be given, the Court held the trial court had a sua sponte duty to instruct the jury on

evaluating conflicting evidence. (*Virgil,* at pp. 1261-1262.) Nonetheless, the Court held the failure to give the instruction was harmless error because the jury had received sufficient guidance from other instructions and the prosecutor did not suggest guilt could be determined by comparing the number of witnesses presented by each side:[2] "Considering the instructions as a whole, we are satisfied the jury received ample guidance on how to evaluate conflicting testimony. [Citation.] The prosecutor did not suggest that the jury should decide defendant's guilt by comparing the number of witnesses presented by each side, and there is no evidence the absence of CALJIC No. 2.22 hampered the jury's ability to evaluate the evidence. Because it is not reasonably probable that the jury would have reached a different result had CALJIC No. 2.22 been given, the court's error in failing to give the instruction was harmless." (*Virgil,* at p. 1262.)

As Soto acknowledges, his jury received the same or similar instructions as those held by the Court in *Virgil* as providing sufficient guidance on evaluating conflicting testimony, including CALCRIM Nos. 105 ("Witnesses"), 224 and 225 ("Circumstantial Evidence"), 226 ("Credibility of Witnesses") and 301 ("Single Witness's Testimony"). In an effort to distinguish *Virgil,* therefore, Soto cites various portions of the record to suggest the prosecutor in the instant case, unlike in *Virgil,* emphasized the disparity in the number of witnesses presented by the prosecution and the defense. The prosecutor here did nothing of the sort. Rather, the prosecutor simply reviewed the substance of each prosecution witness's testimony to support the elements of the People's case. The prosecutor also reviewed the substance of Soto's testimony, highlighting the weaknesses

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[2] The *Virgil* jury was instructed with CALJIC No. 2.00 ("Direct and Circumstantial Evidence—Inferences"); CALJIC No. 2.20 ("Credibility of Witness"); CALJIC No. 2.21.1 ("Discrepancies in Testimony"); CALJIC No. 2.21.2 ("Witness Willfully False"); CALJIC No. 2.27 ("Sufficiency of Testimony of One Witness"); CALJIC No. 2.80 ("Expert Testimony"); CALJIC No. 2.01 ("Sufficiency of Circumstantial Evidence—Generally"); CALJIC No. 2.13 ("Prior Consistent or Inconsistent Statements as Evidence"). (*Virgil, supra,* 51 Cal.4th at p. 1262.)

and inconsistencies in his description of events. At no time did the prosecutor highlight, emphasize or even mention the disparity in the number of witnesses offered by each side.

In sum, considering the other instructions given and the arguments by counsel at trial, any error in failing to instruct with CALCRIM No. 302 was harmless. (See *Virgil, supra,* 51 Cal.4th at p. 1262; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. *Soto Has Forfeited His Challenge to the Restitution Order*

Soto challenges the amount of victim restitution awarded, claiming the $7,473.63 award (plus interest) for Molina's funeral expenses is not supported by substantial evidence. Although he failed to object in the trial court, he asserts his argument is cognizable on appeal because, as framed, his argument is one of sufficiency of the evidence, which is not subject to forfeiture. Contrary to Soto's contention, the failure to raise in the trial court an objection to the restitution order is "unwarranted by the evidence" results in a forfeiture of that argument on appeal. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*) ["[B]y his failure to object, defendant forfeited any claim that the [restitution] order was merely unwarranted by the evidence, as distinct from being unauthorized by statute. [Citation.] As the order for restitution was within the sentencing court's statutory authority, and defendant neither raised an objection to the amount of the order nor requested a hearing to determine it [citation], we do not decide whether the court abused its discretion in determining the amount"]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 [considerations of fairness and orderly and efficient administration of law warrant application of the forfeiture doctrine to bar substantial evidence challenge to amount of restitution fine].)

3. *Soto Has Forfeited His Challenge to the Amount of the Court's Reimbursement Order; His Challenge Based on the Absence of Findings on Ability To Pay Is Without Merit*

Soto challenges the court's order pursuant to section 987.8 that he pay $8,719 as reimbursement for his court-appointed counsel's attorney fees, arguing the court failed to hear or consider evidence as to his actual ability to pay and, in any event, the evidence is insufficient to support the amount ordered. (See § 987.8, subd. (b) ["[i]n any case in

which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof"].)

a. *Soto has forfeited any challenge to the lack of notice and a hearing*

Soto limits his appellate argument to challenging the sufficiency of the evidence supporting the amount of the reimbursement order and his ability to pay. He does not argue he was deprived of notice and a hearing on reimbursement. In any event, because Soto did not object in the trial court, that argument would be forfeited. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re Wilford J.* (2005) 131 Cal.App.4th 742, 753-754 [objection on notice grounds forfeited]; see generally *People v. Williams* (1997) 16 Cal.4th 153, 250 [constitutional objections not properly raised are forfeited].)

b. *Soto has forfeited any challenge to the amount of the attorney fee order*

The appellate courts have disagreed whether the failure to raise an objection to the amount of the reimbursement order in the trial court results in a forfeiture on appeal. (Compare *People v. McMahan* (1992) 3 Cal.App.4th 740, 750 [failure to object to attorney fee order under § 987.8 in trial court results in forfeiture of issue on appeal] with *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215 (*Viray*) ["[w]e do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*"].)

In refusing to apply the forfeiture doctrine in these circumstances, our colleagues in the Sixth District emphasized the inherent conflict of interest that exists when, at the time of the order, the defendant is still represented by appointed counsel: "It seems obvious to us that when a defendant's attorney stands before the court asking for an order taking money from the client and giving it to the attorney's employer, the representation is burdened with a patent conflict of interest and cannot be relied upon to vicariously attribute counsel's omissions to the client. In such a situation the attorney cannot be viewed, and indeed should not be permitted to act, as the client's representative. Counsel can hardly be relied on to contest an order when a successful contest will directly harm

the interests of the person or entity who hired him and to whom he presumptively looks for future employment." (*Viray, supra,* 134 Cal.App.4th at pp. 1215-1216.) Significantly, the *Viray* court explained its analysis "obviously" "has no application where the defendant has engaged independent counsel before reimbursement is ordered. [Citation.] Such a case would be governed by the usual principles concerning preservation of objections by a represented party." (*Id.* at p. 1216, fn. 15.)

Here, Soto's appointed counsel was relieved and replaced by private counsel on December 3, 2010, well before the court's February 24, 2011 order of reimbursement under section 987.8. Thus, the *Viray* analysis does not preclude forfeiture here. (See generally *People v. Saunders* (1993) 5 Cal.4th 580, 590 [""""No procedural principle is more familiar to this Court than that a constitutional right" or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it""""].)

Other courts have refused to find forfeiture on the ground a challenge to the amount of the reimbursement order is a sufficiency of the evidence issue, which may be raised for the first time on appeal. (See *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 [question whether § 987.8 order is supported by sufficient evidence of defendant's ability to pay may be raised for first time on appeal]; *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [same].)

We find no meaningful distinction between a challenge to the amount of a restitution order, which is forfeited if not raised in the trial court (see *Brasure, supra,* 42 Cal.4th at p. 1075), and a challenge to the amount of an attorney fee reimbursement order under section 987.8. As the Supreme Court recognized in *Brasure*, virtually any challenge to a fee imposed at sentencing without objection can be framed on appeal as one of sufficiency of the evidence. Mere characterization of the argument as one of sufficiency of the evidence does not alter the proper application of forfeiture in these circumstances. (See *Brasure,* at p. 1075.)

c. *Sufficient evidence supports the court's finding on Soto's ability to pay*

Soto also contends there was insufficient evidence as to his ability to pay. (See § 987.8.) The Supreme Court has not yet ruled whether a challenge to the sufficiency of the evidence supporting the defendant's ability to pay fees is subject to forfeiture.[3] We need not decide whether this question is materially different from a challenge to the amount of a restitution order in the forfeiture context. Even if forfeiture is inapplicable in these circumstances, the argument fails on its merits because the evidence was sufficient to support the court's ability-to-pay finding. Soto testified at trial he had made a $200,000 profit on the sale of his Los Angeles home in 2006, just before moving to Texas. Soto offered no objection and no evidence rebutting his trial testimony on that point when the court relied on it in issuing the reimbursement order. On this record, Soto's own testimony is sufficient to support the implied finding of the ability to pay and, thus, the reimbursement order.

4. *The Judgment Is Modified To Strike the DNA Penalty Assessment*

The Government Code includes two statutes authorizing imposition of DNA penalties: Government Code section 76104.6, subdivision (a), initially adopted as Proposition 69 at the November 2, 2004 General Election and later amended, requires courts to impose "an additional penalty" of one dollar for every $10 or part of $10 "upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses." Government Code section 76104.7 provides an additional "state-only" DNA penalty of $3 for every $10 or part of $10 "upon every fine, penalty or forfeiture" imposed and collected by the courts for all criminal offenses. By its terms, the Government Code section 76104.7 fine may only be imposed "in addition to" the Government Code section 76104.6 fine. (See Gov. Code, § 76104.7 ["in addition to the

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[3] A similar question whether a defendant forfeited a claim of inability to pay a Government Code section 29550.2 jail booking fee by failing to object to imposition of the fee at his sentencing hearing is currently pending before the Supreme Court. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.)

penalty levied pursuant to [§] 76104.6, there shall be levied an additional state-only penalty of three dollars ($3) for every ten dollars ($10)" upon "every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses"]; *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396 [§ 76104.7 penalty may only be imposed when § 76104.6 penalty has been imposed"].)

At sentencing the trial court imposed, among other fines, a $20 DNA penalty pursuant to Government Code section 76104.7, subdivision (a). Acknowledging that the Government Code section 76104.7 penalty can only be imposed "in addition to" to the Government Code section 76104.6 penalty, the People urge this court to remand the issue to the trial court, arguing that, despite the minute order's identification of Government Code section 76104.7 as the authorizing statute, the court did not identify the statute on the record. Accordingly, the People urge, clarification is needed as to which statute the court used to impose the DNA penalty. However, remand for clarification is unnecessary because the ruling is improper under either statute. The DNA penalty authorized in Government Code sections 76014.6 and 76104.7 may not be imposed on a restitution fine (Gov. Code, §§ 76104.6, subd. (a)(3)(A) & 76104.7, subd. (c)(1)), a court security assessment (§ 1465.8, subd. (b); *People v. Valencia*, *supra*, 166 Cal.App.4th at p. 1396) or a criminal conviction assessment (Gov. Code, § 70373, subd. (b)). Thus, the DNA penalty could not have been lawfully imposed on any of the fines or assessments ordered in this case. Accordingly, we modify the sentence to strike the $20 DNA penalty assessment. (See generally *People v. Scott* (1994) 9 Cal.4th 331, 354 [appellate court may modify unauthorized sentence even absent objection in trial court "because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing"].)

## DISPOSITION

The judgment is modified to strike the $20 DNA penalty assessment. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.